

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No. EB-01-IH-0642
)	
SBC Communications, Inc.)	NAL/Acct. No. 20023208001
)	
Apparent Liability for Forfeiture)	FRN Nos. 0004-3051-24
)	0004-3335-71
)	0005-1937-01

FORFEITURE ORDER

Adopted: April 9, 2002

Released: April 15, 2002

By the Commission:¹

I. INTRODUCTION

1. In this Forfeiture Order, we find that SBC Communications, Inc. ("SBC") violated an Enforcement Bureau ("Bureau") order requiring SBC to provide sworn verification of the truth and accuracy of answers to a letter of inquiry ("LOI") that the Bureau issued pursuant to authority provided by the Communications Act of 1934, as amended ("Act").² Based on the facts and circumstances before us and after considering SBC's response to the Bureau's Notice of Apparent Liability ("NAL") in this matter, we conclude that SBC is liable for a forfeiture of one hundred thousand dollars (\$100,000), the amount the Bureau proposed in the NAL.

II. FACTS

2. As described more fully in the NAL,³ on October 1, 2001, the Enforcement Bureau sent SBC an LOI directing SBC to provide answers to several questions regarding possible discrimination by SBC in its provisioning and maintenance of digital subscriber line

¹ We note that the Enforcement Bureau issued the Notice of Apparent Liability in this case under its delegated authority, but has now referred the matter to the Commission given the significance of the challenge to the Commission's authority. 47 C.F.R. § 0.5(c) ("the staff is at liberty to refer any matter at any stage to the Commission for action, upon concluding that it involves matters warranting the Commission's consideration").

² 47 U.S.C. §§ 218, 403, 154(i), 154(j).

³ *SBC Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 19370 (2001) ("NAL").

(“DSL”) technology and possible misrepresentations by SBC to the Bureau.⁴ The Bureau further directed SBC to verify the veracity of its answers by providing a sworn statement attesting to the truth and accuracy of the responses.⁵ SBC did not object to or challenge the Bureau’s order in any manner. Instead, on October 22, 2001, SBC submitted a response to the LOI that addressed the questions but omitted the requisite sworn statement.⁶ SBC did not identify this omission to the Bureau.

3. Soon after receiving SBC’s response to the LOI, Enforcement Bureau staff discovered the omission and contacted the company to determine the reason for the noncompliance and to provide the company with an opportunity to correct it. SBC, however, disclosed to Bureau staff that it had intentionally refused to provide the sworn statement and that it did not intend to comply with that aspect of the Bureau’s order.⁷ The Bureau informed the company that SBC was in violation of the order.⁸ On November 2, 2001, SBC had still not provided the sworn statement, and the Bureau issued the NAL proposing a forfeiture of \$100,000 and again directing SBC to provide a sworn statement. As with the Bureau’s original direction to provide a sworn statement, SBC did not request that the Bureau or the Commission stay the portion of the NAL directing it again to provide a sworn statement. On November 7, 2001, SBC provided the sworn statement, noting that it did so “under protest.”⁹ On December 3, 2001, SBC

⁴ See Oct. 1, 2001 Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to Sandra L. Wagner, Vice President – Federal Regulatory, SBC Telecommunications, Inc. (“LOI”).

⁵ *Id.*

⁶ See Oct. 22, 2001 Letter from William A. Brown, Senior Counsel, SBC Telecommunications, Inc. to Elizabeth H. Valinoti, Attorney, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (“LOI Response”).

⁷ See Dec. 3, 2001 Response of SBC Communications, Inc. to Notice of Apparent Liability for Forfeiture (“NAL Response”), Attachment F, “Affidavit of Caryn D. Moir” at ¶ 6. As it turns out, this instance was not the first in which SBC violated a Bureau directive to submit a sworn written response to a Bureau inquiry. In at least two other Bureau investigations, both of which involved possible misrepresentations by SBC, SBC ignored a Bureau directive that the company submit a sworn written response to a Bureau LOI without identifying the omission to the Bureau and without offering any explanation – legal or otherwise – for its omission. *Compare* Letter from David H. Solomon, Chief, Federal Communications Commission Enforcement Bureau to Sandra L. Wagner, Vice-President, Federal Regulatory, SBC Telecommunications, Inc., dated July 26, 2001 (LOI directing a “sworn written response”) (“July 26, 2001 LOI”) with Letter from Reid M. Figel, counsel to SBC Communications, Inc. to David H. Solomon, Chief, Federal Communications Commission Enforcement Bureau dated Sept. 7, 2001 (unsworn written response to July 26, 2001 LOI). *Compare* Letter from Bradford M. Berry, Deputy Chief, Federal Communications Commission Enforcement Bureau to Sandra L. Wagner, Vice-President, Federal Regulatory, SBC Telecommunications, Inc., dated Sept. 14, 2001 (LOI directing a “sworn written response”) (“Sept. 14, 2001 LOI”) with Letter from Reid M. Figel, counsel for SBC Communications, Inc., to Trent Harkrader, Federal Communications Commission Enforcement Bureau dated Sept. 19, 2001 (unsworn written response to Sept. 14, 2001 LOI).

⁸ See NAL Response at 5; *see also* NAL Response, Attachment F, “Affidavit of Caryn D. Moir” at ¶ 6.

⁹ In response to the NAL’s order that SBC “submit, not later than November 7, 2001, a sworn written response to the Bureau’s LOI,” NAL at 5, SBC filed an affidavit signed by an officer of the company attesting that the information submitted in response to the Bureau’s October 1, 2001 LOI was “true and correct to the best of [the officer’s] knowledge.” See “Verification to Letter of Inquiry, File No. EB-00-IH-0282” signed by John S. (continued....)

filed its response to the NAL.¹⁰

III. DISCUSSION

4. Under section 503(b) of the Act, “[a]ny person who is determined by the Commission to have . . . willfully or repeatedly failed to comply with . . . any order issued by the Commission under this Act” shall be liable for a forfeiture penalty.¹¹ In order to impose such a forfeiture, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.¹² The Commission will then issue a forfeiture order if it finds by a preponderance of the evidence that the person has violated the relevant order.¹³ As set forth in detail below, we conclude that, based on this standard, SBC is subject to forfeiture.

5. The issue presented here is whether SBC violated the Bureau’s directive that SBC provide sworn verification of the accuracy and truthfulness of its answers to the Commission’s written inquiries. SBC argues that the Commission has no authority to require it to submit an attestation in the circumstances presented here. But the order at issue here was squarely within the Commission’s authority and, in any event, parties are required to comply with Commission orders even if they believe them to be outside the Commission’s authority. Therefore, based upon our review of the NAL, of SBC’s response thereto, and of the record in this matter, we find that SBC willfully violated a Commission order.¹⁴

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Habeeb, Director – Regulatory, SBC Advance Services, Inc., attached to Nov. 7, 2001 Letter from Caryn D. Moir, Vice President – Federal Regulatory, SBC Telecommunications, Inc. to Elizabeth H. Valinoti, Attorney, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (“SBC’s Nov. 7, 2001 Letter”). SBC submitted this affidavit “under protest and without prejudice to its contention that the Enforcement Bureau has no authority either to compel sworn testimony absent a subpoena or to attach additional costs to SBC for seeking review of a contested point of law.” See SBC’s Nov. 7, 2001 Letter at 2.

¹⁰ See NAL Response.

¹¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a).

¹² 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

¹³ See, e.g., *Tuscola Broadcasting Co.*, Memorandum Opinion and Order, 76 FCC 2d 367, 371 (1980) (applying preponderance of the evidence standard in reviewing Bureau level forfeiture order). Cf. 47 U.S.C. § 312(d) (assigning burden of proof in hearings to Commission).

¹⁴ Under the Communications Act, a party “willfully” violates the Communications Act or a Commission rule or order when it knows it is taking the action in question, irrespective of any intent to violate the Commission’s rules. See 47 U.S.C. § 312(f); *Southern California Broadcasting Co., Licensee, Radio Station KIEV(AM) Glendale, California*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88, ¶ 5 (1991) (citing legislative history that definition of willful in section 312(f) applies to section 503(b)); *Liability of Hale Broadcasting Corp., Licensee of Radio Station WMTS Murfreesboro, Tennessee*, Memorandum Opinion and Order, 79 FCC 2d 169, 171, ¶ 5 (1980).

A. Congress Authorized The Commission To Require Regulated Entities To Provide Sworn Statements Verifying The Truth And Accuracy Of Information Submitted During A Commission Investigation.¹⁵

6. The Commission has statutory authority to require its regulatees to attest to the veracity and accuracy of answers to written questions that we pose during the course of an investigation into potential violations of the Act or Commission rules. In sections 4(i), 4(j), 218, 403, and 208 of the Act, Congress afforded us with broad authority to investigate regulated entities.¹⁶ This broad investigative authority in these sections individually and collectively encompasses the authority to obtain from carriers information supported by attestations to ensure that the information is accurate and truthful.

7. Section 218 of the Act authorizes us to “obtain from . . . carriers . . . full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.”¹⁷ This provision plainly grants us broad investigative power. SBC’s argument that section 218 does not speak to the means by which we may obtain information is misplaced.¹⁸ As we will explain more fully below, in many cases information supported by attestation is “information necessary” to enable us to perform our enforcement function.¹⁹ Therefore, section 218’s broad grant of authority covers our action here.

8. Section 403 also gives the Commission broad authority to “make and enforce orders” relating to the matter under investigation.²⁰ Moreover, it gives the Commission the same

¹⁵ The Commission has delegated to the Enforcement Bureau broad authority to serve as “the primary Commission entity responsible for enforcement of the Communications Act and other communications statutes, the Commission’s rules, Commission orders and Commission authorizations.” 47 C.F.R. §§ 0.111(a), 0.311. This delegated authority expressly includes the authority to “[i]ssue or draft orders taking or recommending appropriate action in response to complaints or investigations,” and to “issue . . . appropriate interlocutory orders and take appropriate action in the exercise of its responsibilities.” 47 C.F.R. § 0.111(a)(14). Where this Forfeiture Order speaks to Commission authority, therefore, it also applies to the delegated authority of the Enforcement Bureau.

¹⁶ 47 U.S.C. §§ 154(i), 154(j), 208, 218, 403. *See also* 47 U.S.C. §308(b) (authority to investigate radio licensees and applicants).

¹⁷ 47 U.S.C. § 218. “The Commission may inquire into the management of the business of all carriers subject to this Act. . . . The Commission may obtain from such carriers, and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to perform the duties and carry out the objects for which it was created.” *Id.*

¹⁸ NAL Response at 18.

¹⁹ *See infra* ¶ 10.

²⁰ 47 U.S.C. § 403.

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any

(continued....)

“powers and authority” in conducting an investigation that it would have when investigating a section 208 complaint.²¹ In this regard, section 208 says the Commission can investigate such matters “in such manner and such means as it shall deem proper.”²²

9. The broad authority in sections 4(i) and 4(j) for the Commission to “issue such orders . . . as may be necessary in the execution of its functions” and to “conduct its proceedings in such manner as will best conduce the proper dispatch of business and to the ends of justice” further supports our authority to require attestations.²³ It is well established that sections 4(i) and 4(j) afford us broad general authority and power,²⁴ and the Bureau’s action here falls comfortably within the scope of that authority as well.

10. We are not persuaded by SBC’s argument that sworn verification here was not “necessary” and thus was outside the scope of our authority under section 4(i).²⁵ When the Commission conducts an investigation, the subject of the investigation may be the exclusive source of information on which the Commission must ultimately rely to determine the subject’s compliance. In these situations, the willingness of the subject to attest to the truth and accuracy of the information can be critical. This type of attestation takes on even greater significance when, as in this case, a core question at issue is whether a carrier has engaged in misrepresentation to the Commission.²⁶ As we have said in another context, we afford greater

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provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money. *Id.*

²¹ *Id.*

²² 47 U.S.C. § 208(a). “If such carrier or carriers [in response to a complaint] shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.” *Id.*

²³ “The Commission may perform any and all such acts, . . . and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i). “The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.” 47 U.S.C. § 154(j).

²⁴ See, e.g., *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968). “Congress declined to ‘stereotyp(e) the powers of the Commission to specific details.’” *Id.* at 180 (quoting *NBC v. U.S.*, 319 U.S. 190, 219 (1943)). “Thus, the Commission has been explicitly authorized to issue ‘such orders, not inconsistent with this (Act), as may be necessary in the execution of its functions.’” *Id.* (citing section 4(i) of the Communications Act, 47 U.S.C. § 154(i)). See also *FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (section 4(j) “delegates broad discretion” to the Commission to, *inter alia*, “make ad hoc procedural rulings in specific cases.”); *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404 (D.C. Cir. 1990) (and cases cited therein).

²⁵ See NAL Response at 16.

²⁶ See NAL 19371 at ¶ 4, 19373 at ¶ 10.

weight to comments and pleadings supported by affidavits or sworn statements than to unsupported contrary pleadings.²⁷ Indeed, a party's failure to submit such an attestation in the context of an investigation has led to a higher forfeiture amount for the underlying substantive violation.²⁸ These types of verifications can be necessary to the Commission's investigative function,²⁹ and the requirement of such verification here falls squarely within the category of acts and orders envisioned as necessary under section 4(i).³⁰

11. SBC protests that the requirement that it attest to the veracity of responses to the Bureau's questions is not a "question of procedure" that properly falls within section 4(j).³¹ But this requirement is precisely a procedural means by which the Commission obtains the substantive response it seeks, i.e., answers that bear a unique imprimatur of reliability. Indeed, this type of requirement is a standard and fundamental procedural tool in the context of both Commission formal complaint proceedings and in civil litigation generally. As noted above, section 208 of the Act (which is incorporated here through section 403), states that it is the "duty" of the Commission to investigate "in such manner and by such means as it shall deem proper."³² Our rules implementing section 208 state that the Commission "may require parties [to a complaint proceeding] to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, *including affidavits and exhibits*,"³³ and they require that interrogatories in complaint proceedings "are to be answered . . . in writing *under oath or affirmation*."³⁴ Similarly, the Federal Rules of Civil Procedure require that parties must provide answers to interrogatories under oath.³⁵ The attestation requirement is identical in

²⁷ See *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20569 (1997).

²⁸ See, e.g., *Sound Broadcasting Corp.*, Notice of Apparent Liability for Forfeiture, 7 FCC Rcd 3378, 3379 (Mass Media Bureau 1992) (noting that a forfeiture in the "full amount . . . allowed by law" was to be imposed because the company's reply "included only non-notarized statements . . . although [the Mass Media Bureau] had requested notarized affidavits").

²⁹ The fact that 18 U.S.C. § 1001 and 47 C.F.R. § 1.17 require SBC to tell the truth does not, as SBC suggests, render an attestation superfluous. See NAL Response at 16, 28. Requiring submission of an attestation may elicit a higher level of care and attention than the level that answers unaccompanied by verification may prompt. Attestations can be necessary to attain the level of reliability that we require to enforce the Act and our orders and rules. Moreover, to the extent that, as SBC suggests, the standards of accuracy, reliability, and accountability elicited by sections 1001 and 1.17 are truly indistinguishable from those the company must meet when we require it to attest to the accuracy and veracity of written responses, the basis for SBC's objection to such an attestation is unclear.

³⁰ Similarly, as we have noted above, information supported by sworn verification may be "necessary" for purposes of 47 U.S.C. § 218. See *supra* ¶ 7.

³¹ See NAL Response at 16 (citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)).

³² 47 U.S.C. § 208(a).

³³ 47 C.F.R. § 1.732(g) (emphasis added).

³⁴ 47 C.F.R. § 1.729(e) (emphasis added).

³⁵ Fed. R. Civ. Pro. 33(b)(1).

function and purpose to these other requirements. Thus, section 4(j) also provides authority for the Bureau's order.

12. In sum, we find that the Bureau was well within its statutory authority in requiring SBC to provide a sworn written verification of the truth and accuracy of its responses to the LOI. In defying that directive, SBC willfully violated a Commission order.

B. The Commission's Subpoena Power Is Not Relevant To This Case.

13. In section 409 of the Act, Congress afforded the Commission with subpoena power to compel "the *attendance and testimony of witnesses* and the *production* of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation."³⁶ SBC's primary argument in defense of its defiance of the Bureau's order is that the Commission may only require carriers to attest to the veracity of their LOI responses pursuant to this section 409 subpoena power and all of its accompanying statutory and constitutional procedures and protections. Even assuming, *arguendo*, that section 409 provides the exclusive means for the Commission to obtain information within the ambit of that section,³⁷ we reject SBC's argument simply because section 409 has no relevance to the requirement that a carrier attest to the veracity and accuracy of its answers to our written inquiries.

14. By its own terms, section 409 relates only to the "attendance and testimony of witnesses," and the production of documentary evidence.³⁸ Section 409 is styled "General Provisions Relating to Proceedings – Witnesses and Depositions," setting forth the limited scope of its applicability. Section 409 itself acknowledges that the Commission has means other than subpoenas to obtain information from parties.³⁹ In relevant part, section 409 governs the use of the Commission's subpoena power to compel individuals to appear and testify at hearings or depositions. The Bureau did not seek to compel the appearance of witnesses for testimony. The LOI merely sought a "sworn written response"⁴⁰ verifying the truth and accuracy of SBC's answers to the LOI. As noted above, in this respect the LOI followed long-standing Commission practice. We have routinely required affidavits and verifications from regulated entities during the course of various proceedings without asserting subpoena power.⁴¹ Our orders requiring regulatees to submit affidavits or to swear to the accuracy of responses to our written inquiries

³⁶ 47 U.S.C. § 409(e) (emphasis added).

³⁷ See *infra* n.46.

³⁸ 47 U.S.C. § 409.

³⁹ 47 U.S.C. § 409(m).

⁴⁰ LOI at 2, 4.

⁴¹ See, e.g., *Peninsula Communications, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 16 FCC Rcd 16124 (2001) (ordering broadcast licensee to "submit an affidavit informing [the Commission] whether [it] has ceased operating . . . translators and whether it intends to operate those translators at any time in the future absent authorization to do so"); see also *Brindlee Broadcasting Corp.*, Memorandum Opinion and Order, 54 FCC 2d 56, 57 (Rev. Bd. 1975) (ordering president of broadcast license applicant to submit "an explanation . . . under oath as to how he plans to fulfill his full-time commitment to [the license applicant] Brindlee" and his commitments to other organizations in which he holds an interest).

do not trigger the requirements of section 409.

15. Consequently, we reject SBC's argument that the specific requirements of section 409 supersede the more general provisions of sections 218, 403, 4(i) and 4(j).⁴² Although section 409 may be more detailed in its requirements, those requirements simply do not apply to the circumstances of this case.⁴³ Rather, sections 218, 403, 4(i), and 4(j) control here.⁴⁴ Therefore, we also reject SBC's assertion that the Bureau's failure to comply with the procedural requirements of section 409 rendered its order invalid.⁴⁵ Those requirements did not apply to the Bureau's action.

C. SBC's Constitutional Arguments Are Without Merit.

16. Our federal constitution affords to subjects of administrative subpoenas or other administrative orders particular rights of access to judicial review. First, as to administrative subpoenas, SBC invokes the right of a subject of such a subpoena to judicial review before the subject is obliged to suffer penalties for refusing to comply.⁴⁶ Second, as to other administrative orders, SBC refers us to its asserted right to an opportunity to raise a good faith challenge to an order before being sanctioned.⁴⁷ We reject each of these arguments because they depend on fundamental misconstructions of the relevant facts and applicable law in this case.

17. First, as we concluded above, this case did not involve a subpoena, and SBC is incorrect that the Act required the Bureau to use a subpoena.⁴⁸ Therefore, the constitutional protections that attach to the enforcement of a subpoena are not applicable here. Even so, Congress provided a carefully constructed protocol for our forfeiture proceedings that allows ample opportunity for judicial review before any subject of a Commission forfeiture order may

⁴² See NAL Response at 14-18.

⁴³ Our conclusion is perfectly consistent with the case law SBC cites in its Response to the NAL. For example, in *AT&T v. FCC*, the FCC's use of its broad authority conferred in sections 4(i), 4(j), 403 and numerous other sections of the Act conflicted with "precise procedures and limitations" in section 205 of the Act. *AT&T v. FCC*, 487 F.2d 865, 873 (2d Cir. 1973). In this case, however, the procedures and limitations of section 409 simply do not apply. Hence, no conflict exists.

⁴⁴ We also note that the Supreme Court has upheld the Commission's authority to utilize its general section 4(i) authority even when a more specialized provision of the Act is at the Commission's disposal. *U.S. v. Southwestern Cable Co.*, 392 U.S. at 180 n.46 (noting that the Commission need not "issue prohibitory orders only under, and in conformity with . . . section [312(b) of the Communications Act]," and that it appropriately may rely on its general section 4(i) powers to issue such orders).

⁴⁵ NAL Response at 13. The procedural protections afforded by section 409 include payments to witnesses and deponents, aid to the Commission by federal courts in instances of disobedience to a subpoena, depositions before specified, disinterested officers, and caution to deponents to testify the whole truth. 47 U.S.C. §§ 409(e), (f), (g), (h), (i), (k). We note that these procedures are for the protection of not only the parties subject to subpoenas, but also for the protection of the Commission.

⁴⁶ NAL Response at 19-22.

⁴⁷ NAL Response at 22-25.

⁴⁸ See *supra* ¶¶ 13-15.

suffer any penalties for refusing to comply with that order. The Act explicitly provides that no one can be forced to pay a Commission-imposed non-hearing forfeiture unless or until the forfeiture order has been subjected to federal judicial review in a trial *de novo*.⁴⁹ Thus, SBC will have access to full-blown judicial review before suffering any penalty.⁵⁰ For this reason, and more fundamentally because no subpoena was at issue in this case, we find that the Bureau's actions did not violate any constitutional requirements related to pre-enforcement judicial review of subpoenas.

18. Second, we find SBC's argument that the Bureau improperly sanctioned a constitutionally protected good faith challenge to be misplaced.⁵¹ As an initial matter, an NAL is not itself a sanction; it is a proposed sanction. In addition, contrary to its assertions, SBC did not raise any type of affirmative challenge to the Bureau's sworn statement directive. Rather, it failed even to disclose its noncompliance to the Bureau. Moreover, SBC had conducted itself in this manner on two prior occasions, and never brought its objection to the Bureau's attention.⁵²

19. Far from extinguishing SBC's right to challenge the sworn statement directive, the Bureau virtually invited such a challenge. Before issuing the NAL in this case, the Bureau notified SBC that it had discovered the omission of the sworn statement, gave SBC the opportunity to admit and correct its noncompliance, and informed SBC that it was in violation of a Commission order.⁵³ At that point in time, and even before, SBC could have raised a good faith challenge to the order. As an initial matter, SBC could have taken the minimal step of alerting the Bureau of its concerns prior to, or simultaneous with, its submission of its October 22, 2001 response to the LOI. In addition, at the same time, or at least upon receiving notice that it was in violation of the order, SBC could have petitioned the Commission or the Bureau for a stay of the portion of the October 1, 2001 order that required the sworn statement.⁵⁴ Nonetheless, SBC chose not to avail itself of the opportunity to raise a genuine good faith

⁴⁹ 47 U.S.C. § 504(a). If a party chooses not to pay a non-hearing forfeiture, the Commission may refer the matter to the U.S. Department of Justice for collection proceedings, in which case the party is entitled to an entirely new trial on the merits in federal court.

⁵⁰ Even assuming that the administrative subpoena cases SBC cites apply here, none of them requires more than that the parties have the right to judicial review of an administrative subpoena before "suffering penalties for refusing to comply." See *See v. City of Seattle*, 387 U.S. 541, 544 (1967), *quoted in*, NAL Response at 19. Indeed, those cases tend to reinforce our finding here that there is ample opportunity for judicial review of the order at issue, and that it is incumbent upon SBC to invoke those protections. See, e.g., *Oklahoma Press Publ'g Co v. Walling*, 327 U.S. 186, 217 (1946) (rejecting petitioners' argument that agency subpoena power would subject them to impermissible inconvenience, expense, and harassment precisely because "they may make appropriate defense surrounded by every safeguard of judicial restraint.") (internal quotation omitted).

⁵¹ See NAL Response at 22-26.

⁵² See *supra* n.7.

⁵³ See *supra* ¶ 3.

⁵⁴ 47 C.F.R. §§ 1.43, 1.44.

challenge to the order.⁵⁵

20. SBC's mere belief that the Bureau's sworn statement directive was unlawful cannot excuse its conduct here, and it certainly cannot amount to a good faith challenge to the order. The Act provides that "[a]ll such orders shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order."⁵⁶ Moreover, "[i]t shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with such orders so long as the same shall remain in effect."⁵⁷ As we have stated very recently, "a licensee cannot ignore a Commission order simply because it believes such order to be unlawful."⁵⁸

21. Finally, none of the cases on which SBC bases this argument would support a finding that SBC exercised a good faith challenge in this case.⁵⁹ To the contrary, SBC did "default[] [and] contumaciously refuse[] to comply," and our process "provides full opportunity for judicial review *before* any coercive sanctions may be imposed."⁶⁰ We reject SBC's argument that the Bureau improperly sanctioned a good faith challenge to the LOI. The Bureau provided ample due process to SBC.

D. The Forfeiture Amount Is Lawful and Appropriate.

22. Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to \$120,000 for each violation, or each day of a continuing violation, up to a statutory maximum of \$1,200,000 for a single act or failure to act.⁶¹ In determining the appropriate forfeiture amount, we consider the factors enumerated in section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the

⁵⁵ Moreover, as we discuss above, *see supra* ¶ 17, even after the issuance of this Forfeiture Order, SBC may choose not to pay the forfeiture and to raise a challenge to our findings in a trial *de novo* should the Department of Justice prosecute any collection action we may refer.

⁵⁶ 47 U.S.C. § 408.

⁵⁷ 47 U.S.C. § 416(c).

⁵⁸ *See Peninsula Communications, Inc.*, Forfeiture Order, FCC 02-31 at ¶ 5 (rel. Feb. 6, 2002).

⁵⁹ *See* NAL Response at 22-26. In these cases, parties subject to various subpoenas or fines actively sought judicial relief to stay and/or enjoin the relevant order. *See, e.g., Oklahoma Operating Co. v. Love*, 252 U.S. 331, 339 (1920) (laundry company sued to enjoin Oklahoma Corporation Commission from entertaining rate complaints against company, and from enforcement related to such complaints); *see also, Reisman v. Caplin*, 375 U.S. 440, 441 (1964) (attorney filed suit seeking declaratory ruling and injunctive relief against IRS to invalidate a subpoena demanding production of work papers); *see also Belle Fourche Pipeline Co. v. U.S.*, 751 F.2d 332, 333 (10th Cir. 1984) (oil company filed complaint seeking declaratory and injunctive relief against an investigation by the Federal Energy Regulatory Commission).

⁶⁰ *See* NAL Response at 23 (quoting *Reisman v. Caplin*, 375 U.S. 440, 448 n.8, 450 (1964) (emphasis added)). Even under SBC's asserted interpretation that section 503(b) must, as a constitutional matter, permit good faith pre-enforcement challenges, the Bureau's actions were still entirely appropriate.

⁶¹ 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R. § 1.80(b)(2); *see also Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000).

violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁶²

23. Section 1.80 of the Commission’s rules and the Commission’s *Forfeiture Policy Statement* establish a base forfeiture amount of \$3,000 for failure to file required forms or information.⁶³ As noted in the NAL, however, the circumstances of this case justify a substantial increase to this base amount pursuant to upward adjustment criteria contained in the rules and the *Forfeiture Policy Statement*.⁶⁴ Specifically, the Bureau found that the adjustment was appropriate because the misconduct was egregious; the violation was intentional; and the forfeiture amount must be high enough to serve a deterrent effect in view of SBC’s ability to pay.⁶⁵

24. SBC objects to several aspects of the Bureau’s reasoning, and it contends that the forfeiture amount proposed in the NAL is inappropriate because: (1) SBC did not intentionally violate the LOI; (2) SBC’s conduct did not impede the Bureau’s investigation; and (3) SBC and the Bureau still were “negotiating” when the Bureau issued the NAL.⁶⁶ None of these points has merit.

25. First, SBC explicitly acknowledged to the Bureau that its failure to comply with the LOI was intentional.⁶⁷ SBC admittedly had knowledge of its actions and of the fact that those actions violated a Commission order.⁶⁸ The company cannot now credibly argue that its conduct was unintentional.

26. Second, SBC’s refusal to attest to the truth and accuracy of its responses to the Bureau’s written questions did impede the Bureau’s investigation. As the Bureau properly noted in the NAL, “SBC’s decision not to provide the requisite sworn statement here obstructs the Bureau’s investigation into discrepancies in SBC’s various representations to the Commission. SBC’s conduct strikes at the core of the Bureau’s ability to perform its function, and rises above the level of a mere omission or failure to file.”⁶⁹

27. Third, SBC and the Bureau were not “negotiating” at the time the Bureau issued the NAL. Indeed, Bureau staff had made clear to SBC that SBC’s obligation to submit a sworn

⁶² 47 U.S.C. § 503(b)(2)(D); see also *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17100 (1997) (“*Forfeiture Policy Statement*”); *recon. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

⁶³ 47 C.F.R. § 1.80; *Forfeiture Policy Statement*, 12 FCC Rcd at 17114, Appendix A, Section I.

⁶⁴ NAL at 19372-73.

⁶⁵ 47 C.F.R. § 1.80; *Forfeiture Policy Statement*, 12 FCC Rcd at 17100.

⁶⁶ See NAL Response at 27–29.

⁶⁷ See NAL Response, Attachment F, “Affidavit of Caryn D. Moir” at ¶ 6.

⁶⁸ *Id.* See also *supra* ¶ 3.

⁶⁹ NAL 19373 at ¶ 10. See *supra* ¶ 10 and n.30 (discussing necessity of attestations to Commission investigations).

written response was not open for negotiation between SBC and the Bureau.⁷⁰ In any event, the Bureau was under no obligation even to inform SBC of its noncompliance or to give SBC an opportunity to comply. It did so as a courtesy and was not required to do more.⁷¹ When a carrier deliberately violates a Commission directive, it should not be surprised that the Commission would issue an NAL upon discovering the violation.

28. For all of the reasons we have discussed above, we find that SBC's conduct justified the forfeiture amount that the Bureau proposed. We therefore affirm the \$100,000 forfeiture amount originally proposed by the Bureau.⁷²

IV. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED THAT, pursuant to section 503(b) of the Act,⁷³ and section 1.80 of the Commission's Rules,⁷⁴ SBC Communications SHALL FORFEIT to the United States Government the sum of one hundred thousand dollars (\$100,000) for violating an Enforcement Bureau order to submit a sworn written response to a Bureau LOI.

30. IT IS FURTHER ORDERED that payment shall be made in the manner provided for in section 1.80 of the Commission's rules within 30 days of release of this order.⁷⁵ If the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.⁷⁶

31. IT IS FURTHER ORDERED that a copy of this Order of Forfeiture shall be sent by Certified Mail/Return Receipt Requested to SBC Communications, c/o Caryn D. Moir, Vice President - Federal Regulatory, 1401 I Street, N.W., Suite 1100, Washington, D.C. 20005.

⁷⁰ See NAL Response at 5; see also NAL Response, Attachment F, "Affidavit of Caryn D. Moir" at ¶ 6.

⁷¹ "The Commission is not required to bargain with its licensees for the information to which it is entitled in order properly to carry out its functions." See *James A. Kay, Jr.*, Decision, FCC 01-341 at ¶ 40 (rel. Jan. 25, 2002) (quoting *Carol Music, Inc.*, 37 FCC 379, 384 (1964)) (acknowledging licensee right to register principled objections to Commission directives but noting that objections do not negate licensee obligation to comply with directives).

⁷² SBC correctly points out that \$100,000 is the maximum forfeiture available at this point in this case, see, e.g., NAL Response at ii, iv, 27, 28, but the company misunderstands the reason for that limitation. The Commission is limited here to imposing a maximum \$100,000 forfeiture only because this Order is based on a Bureau-level NAL in which the Bureau proposed a forfeiture of \$100,000, which is the cap on its delegated authority. See 47 C.F.R. § 0.311. We note, however, that had the Commission itself issued the NAL in the first instance, we could have imposed a forfeiture here of up to \$120,000 per day, up to a maximum of \$1.2 million for the more than 10 days for which SBC's violation continued. See 47 U.S.C. § 503(b)(2)(B); see also 47 C.F.R. § 1.80(b)(2); see also *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000).

⁷³ 47 U.S.C. § 503(b).

⁷⁴ 47 C.F.R. § 1.80.

⁷⁵ *Id.*

⁷⁶ 47 U.S.C. § 504(a).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary